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April 2, 2007

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VIA FACSIMILE, E-MAIL and U.S. MAIL

Mr. Bruce Gelber
Chief, Environmental Enforcement Section
Environmental and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044-7611
Re: DJ #90-11-3-06529

Mr. Keith Takata
Director, Superfund Division
U.S. Environmental Protection Agency
Region 9
75 Hawthorne Street
San Francisco, CA 94105

Re: Omega PRP Organized Group's ("OPOG") Reply to EPA's Statement of Position
Regarding Certain Oversight Costs

Dear Mssrs: Gelber and Takata:

Enclosed please find the above referenced document. Any questions or comments should be directed to me.

Very truly yours,

Leslie R. Schenck

cc: Karl Fingerhood
Elaine Chan
Chris Lichens
Steve Berninger
Frederick K. Schauffler

SEA_DOCS:838723.1 [12278-00700]
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UNITED STATES OF AMERICA,

Plaintiff,

v.

ABEX AEROSPACE DIVISION and PNEUMO-
ABEX CORPORATION; AIR PRODUCTS AND
CHEMICALS, INC.; ALCOA INC.; ALLIED
SIGNAL, INC. (now known as HONEYWELL
INTERNATIONAL, INC.); ALPHA
THERAPEUTIC CORPORATION; APPLIED
MICRO CIRCUITS CORPORATION;
APPROPRIATE TECHNOLOGIES II, INC.;
ARLON ADHESIVES & FILM; ARMOR ALL
PRODUCTS CORPORATION; AVERY
DENNISON CORPORATION; BASF
CORPORATION; BAXTER HEALTHCARE
CORPORATION; BOEING NORTH AMERICA,
INC.; BONANZA ALUMINUM CORP.;
BORDEN, INC.; BOURNS, INC.; BROADWAY
STORES, INC.; CALIFORNIA DEPT. OF
TRANSPORTATION; CALSONIC CLIMATE
CONTROL, INC. (now known as CALSONIC
NORTH AMERICA, INC.); CANON BUSINESS
MACHINES, INC.; INTERNATIONAL PAPER
COMPANY; WASTE MANAGEMENT, INC.;
UNITED DOMINION INDUSTRIES; CITY OF
LOS ANGELES, DEPARTMENT OF
AIRPORTS; CITY OF SANTA MARIA;
COUNTY OF LOS ANGELES; CROSBY &
OVERTON, INC.; DATATRONICS
ROMOLAND, INC.; DEUTSCH ENGINEERED
CONNECTING DEVICES/DEUTSCH GAV;
DISNEYLAND CENTRAL PLANT; DOW
CHEMICAL COMPANY; FHL GROUP;
FIRMENICH INCORPORATED; FORENCO,
INC.; GAMBRO, INC.; GATX TERMINALS
CORPORATION; GENERAL DYNAMICS
CORPORATION; GEORGE INDUSTRIES;
GOLDEN WEST REFINING COMPANY;
GREAT WESTERN CHEMICAL COMPANY;
GSF ENERGY, L.L.C. (successor to GSF
ENERGY, INC.); GULFSTREAM AEROSPACE

Case No. 00-12741 CAS (Ctx)

Dispute Resolution Pursuant to Consent
Decree Paragraph 57

OMEGA PRP ORGANIZED GROUP's
("OPOG") REPLY TO EPA's
STATEMENT OF POSITION
REGARDING CERTAIN OVERSIGHT
COSTS

CORPORATION; HEXEL CORPORATION;
HILTON HOTELS CORPORATION; HITACHI
HOME ELECTRONICS (AMERICA), INC.; BP
AMERICA, INC.; HONEYWELL
INTERNATIONAL INC.; HUBBEL INC.; HUCK
MANUFACTURING COMPANY (by its former
parent Federal Mogul Corporation); HUGHES
SPACE AND COMMUNICATIONS
COMPANY; HUNTINGTON PARK RUBBER
STAMP COMPANY; INTERNATIONAL
RECTIFIER CORPORATION; JAN-KENS
ENAMELING COMPANY; JOHNS MANVILLE
INTERNATIONAL, INC.; K.C. PHOTO
ENGRAVING CO.; KESTER SOLDER
DIVISION, LITTON SYSTEMS, INC.;
KIMBERLY CLARK WORLDWIDE, INC.;
KOLMAR LABORATORIES, INC.; LOS
ANGELES COUNTY METROPOLITAN
TRANSPORTATION AUTHORITY; LOMA
LINDA UNIVERSITY; BRITISH ALCAN
ALUMINUM, P.L.C.; MATTEL, INC.;
MAXWELL TECHNOLOGIES, INC.; THE MAY
DEPARTMENT STORES COMPANY;
McDONNELL DOUGLAS CORPORATION, a
wholly owned subsidiary of the BOEING
COMPANY; MEDEVA PHARMACEUTICALS
CA, INC. (f/k/a MD PHARMACEUTICAL INC.);
METROPOLITAN WATER DISTRICT OF
SOUTHERN CALIFORNIA; MICO INC.;
MINNESOTA MINING AND
MANUFACTURING COMPANY; QUALITY
CARRIERS INC. (f/k/a MONTGOMERY TANK
LINES, INC.); NI INDUSTRIES (a division of
TRIMAS, a wholly owned subsidiary of MASCO
TECH); NMB TECHNOLOGIES
CORP.; OHLINE CORP.; OJAI
MANUFACTURING TECHNOLOGY, INC.;
SIEMENS MEDICAL SYSTEMS, INC.;
PACIFIC BELL TELEPHONE COMPANY;
PACIFIC GAS & ELECTRIC CO.; PIONEER
VIDEO MANUFACTURING, INC.; PRINTED
CIRCUITS UNLIMITED; NELLCOR PURTIAN-
BENNETT; LONZA INC.; QUEST
DIAGNOSTICS CLINICAL LABORATORIES,
INC. (f/k/a BIO SCIENCE ENTERPRISES);

RATHON CORP. (f/k/a DIVERSEY CORP.);
RAYTHEON COMPANY; REGENTS OF THE
UNIVERSITY OF CALIFORNIA; REICHHOLD
INC.; REMET CORPORATION; RESINART
CORP.; ROBINSON PREZIOSO INC.; ROGERS
CORPORATION; SAFETY-KLEEN SYSTEMS,
INC. (f/k/a SAFETY-KLEEN CORP.); SCRIPTO-
TOKAI CORPORATION; SHELL OIL
COMPANY; THE SHERWIN-WILLIAMS
COMPANY; SIGMA CASTING
CORPORATION (now known as HOWMET
ALUMINUM CASTING, INC.); SIGNET
ARMORLITE, INC.; SOUTHERN CALIFORNIA
EDISON CO.; SOUTHERN PACIFIC
TRANSPORTATION CO. (now known as
UNION PACIFIC RAILROAD COMPANY);
HARSCO CORPORATION; BHP COATED
STEEL CORP.; TELEDYNE INDUSTRIES INC.;
TELEDYNE TECHNOLOGIES
INCORPORATED; TENSION ENVELOPE
CORP.; TEXACO INC.; TEXAS
INSTRUMENTS TUCSON CORPORATION
(f/k/a BURR-BROWN CORP.); TITAN
CORPORATION; TODD PACIFIC
SHIPYARDS; TREASURE CHEST; PACIFIC
PRECISION METALS, INC.; UNION OIL
COMPANY OF CALIFORNIA; UNITED
PARCEL SERVICE, INC.; UNIVERSAL CITY
STUDIOS, INC.; VAN WATERS & ROGERS
INC.; and VOPAK DISTRIBUTION AMERICAS
CORPORATION (f/k/a UNIVAR
CORPORATION); VERTEX MICROWAVE
PRODUCTS, INC. (f/k/a GAMMA-F CORP.);
WALT DISNEY PICTURES AND
TELEVISION; WARNER-LAMBERT
COMPANY; WEBER AIRCRAFT; WESTERN
METAL DECORATING CO.; YORK
INTERNATIONAL CORPORATION; YORT
INC. (f/k/a TROY LIGHTING, INC.-TIFFANY
DIVISION,

Defendant.

1. INTRODUCTION

OPOG hereby submits this Reply in response to the EPA's Statement of Position regarding formal dispute resolution regarding certain costs of CH2MHill. This Reply is filed pursuant to Section XIX of the Consent Decree.

2. EPA DOES NOT INDEPENDENTLY REVIEW CONTRACTOR COSTS FOR ACCURACY OR ACCOUNTING ERRORS

OPOG has challenged certain costs incurred by CH2MHill ("Hill") pursuant to Hill's government contract with EPA related to certain work being performed by Hill related to OU1 of the Omega Chemical Site. EPA seeks reimbursement from OPOG of all Hill's costs, although acknowledging that it does not review the detailed time sheets maintained by Hill and stating that it relies solely on Hill's internal review and certification of its bills and the EPA Project Manager, Chris Lichens, general overview of a highly massaged Monthly Status Report, from Hill. EPA admits at page 12 of its Statement that "EPA does not currently receive or review Hill's individual time sheets..." but then goes on to inaccurately maintain that it "independently reviews all available contractor information to determine if accounting or other errors have been made." EPA does not review all available information to assure that, before it passes on a bill to be paid by OPOG, all contractor costs are in fact appropriate and reasonable, not fraudulent or mistaken.

3. EPA INAPPROPRIATELY RELIES ON CONTRACTORS TO POLICE THEMSELVES

EPA itself states that it relies upon Hill solely to certify its time sheets and review the actual monthly bills for inaccuracies as EPA does not engage in this activity. EPA does not receive from Hill or review Hill's timesheets itself, although Hill maintains such timesheets and they could be reviewed and evaluated. Therefore, there is no way by which either EPA or OPOG could independently discern from Hill documentation whether there have been inadvertent or fraudulent mistakes in time keeping, whether time is properly charged to the correct contracts, or whether there have been any accounting errors in Hill's bills. This function is left completely with Hill as detailed in EPA's Statement. Although OPOG has no evidence and does not here

assert that Hill's costs are fraudulent, the EPA's practice of relying solely on contractors invites potential fraud and abuse as it allows the "fox to guard the hen house."

EPA's policy in this case (and it would appear nationally) seems to be to allow the governmental contractor to police itself thus putting OPOG in the position of paying for costs no one has vetted except the contractor itself, an untenable position for OPOG or any PRP group. EPA claims that it has the same incentives to review the Hill bills that OPOG does even though it is not ultimately paying these costs. Given the fact that EPA does not review or even receive all information Hill has regarding its bills, EPA clearly does not have the same incentives. EPA in fact spends several pages of its Statement arguing the immense burden it would be to EPA if it were to be required to review and evaluate the Hill time sheets supporting their bills prior to passing them on for payment by OPOG. This position clearly indicates EPA's lack of incentive to police its contractors and their billing practices.

OPOG as the entity paying these costs wishes merely to assure that the costs it is paying are properly being charged to the OU1 contract and the CD does require that sufficient information be provided to allow OPOG to review oversight cost bills for accounting or other errors. Providing to OPOG all backup information for work it alone is paying for seems intuitively simple and in the EPA's interest, yet EPA has fought OPOG every step of the way on this issue. EPA's argument that the burden associated with providing OPOG with all contractor information, including time sheets which are already kept by Hill, is specious. It is an integral part of EPA's representation of the public interest to assure that its contractors are appropriately overseen by the EPA and it is likewise just as important to assure that the PRP groups, such as OPOG, which are paying tens of millions of dollars towards environmental cleanups, are assured by the EPA that EPA is vigorously policing its contractors and overseeing their work and the costs associated with such work. EPA's insistence that OPOG rely on EPA's virtually non-existent review of these bills is at best poor public policy and at worst a set up for potential fraud by EPA's contractors.

4. HILLS COSTS CANNOT BE PRESUMED TO BE REASONABLE

OPOG understands that Hill performs the work pursuant to a cost-reimbursable contract, which contract is governed by the Federal Acquisition Regulations ("FAR"). For costs under such a contract to be reimbursable, the FAR requires that costs be allowable, allocable and reasonable. See FAR 31.201-1. According to the FAR:

"No presumption of reasonableness shall be attached to the incurrence of costs by a contractor. If an initial review of the facts results in a challenge of a specific cost by the contracting officer or the contracting officer's representative, the burden of proof shall be upon the contractor to establish that such cost is reasonable." FAR 31.201-3(a).

EPA in its Statement essentially asks the Director to inappropriately presume that Hill's costs are allowable, allocable and reasonable under FAR regulations. EPA states that it *"does not have to prove the accuracy of the contractor's costs for which EPA was billed. Rather EPA must show only that it tasked the contractor to perform response (or in this case oversight) actions, that EPA received a bill for those actions, and that EPA paid it."* This might be true if EPA has in fact first vetted the contractors costs to assure that they are in fact, allowable, allocable and reasonable, but EPA has provided nothing to the Director or OPOG which would indicate that EPA has engaged in such an evaluation under the FAR regulations prior to passing the Hill costs on to OPOG for payment. Therefore, EPA is essentially asking the Director to find that there is a presumption that CH2MHill's costs are reasonable as long as those costs are passed on by EPA to OPOG for payment, no matter how little vetting of the bills EPA engages in. This assumption is contrary to applicable regulations and public policy and should not be condoned.

5. CONCLUSION

EPA does not review or evaluate all available contractor information prior to sending it on to OPOG for payment nor does EPA have the same incentives to oversee the Hill costs that OPOG, the entity paying these costs, does. EPA has not provided OPOG with all documentation Hill regularly compiles, since timesheets Hill creates are

not provided to either EPA or OPOG. EPA's inappropriate reliance on Hill to police itself, with no independent method by which either EPA or OPOG can evaluate the details of the contractor's costs, invites potential fraud and abuse. No one outside of Hill can independently evaluate whether all Hill employees charging to a contract are appropriately charging to that contract, thereby rendering this system for passing on oversight costs, rife with potential for abuse. EPA's request that Hill's costs essentially be given a presumption of reasonableness, no matter how little vetting of those bills is taking place at EPA, is contrary to regulations and public policy. Therefore, OPOG requests that EPA provide to OPOG all documentation created by Hill supporting its costs so that OPOG can assure that an independent review of the bills has been done prior to paying them.

DATED this 2nd day of April, 2007.

GARVEY SCHUBERT BARER

By 

Leslie R. Schenck
OPOG Representative

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